

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Dec 07, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JERRY R.,¹

Plaintiff,

vs.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 1:20-cv-03196-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 16, 17

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

² Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

ORDER - 1

1 Before the Court are the parties' cross-motions for summary judgment. ECF
2 Nos. 16, 17. The parties consented to proceed before a magistrate judge. ECF No.
3 6. The Court, having reviewed the administrative record and the parties' briefing,
4 is fully informed. For the reasons discussed below, the Court grants Plaintiff's
5 motion, ECF No. 16, and denies Defendant's motion, ECF No. 17.

6 JURISDICTION

7 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

8 STANDARD OF REVIEW

9 A district court's review of a final decision of the Commissioner of Social
10 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
11 limited; the Commissioner's decision will be disturbed "only if it is not supported
12 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
13 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
14 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
15 (quotation and citation omitted). Stated differently, substantial evidence equates to
16 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
17 citation omitted). In determining whether the standard has been satisfied, a
18 reviewing court must consider the entire record as a whole rather than searching
19 for supporting evidence in isolation. *Id.*

1 In reviewing a denial of benefits, a district court may not substitute its
2 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
3 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
4 rational interpretation, [the court] must uphold the ALJ’s findings if they are
5 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
6 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §
7 416.920(a). Further, a district court “may not reverse an ALJ’s decision on
8 account of an error that is harmless.” *Id.* An error is harmless “where it is
9 inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115
10 (quotation and citation omitted). The party appealing the ALJ’s decision generally
11 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
12 396, 409-10 (2009).

13 FIVE-STEP EVALUATION PROCESS

14 A claimant must satisfy two conditions to be considered “disabled” within
15 the meaning of the Social Security Act. First, the claimant must be “unable to
16 engage in any substantial gainful activity by reason of any medically determinable
17 physical or mental impairment which can be expected to result in death or which
18 has lasted or can be expected to last for a continuous period of not less than twelve
19 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
20 “of such severity that he is not only unable to do his previous work[,] but cannot,

1 considering his age, education, and work experience, engage in any other kind of
2 substantial gainful work which exists in the national economy.” 42 U.S.C. §
3 1382c(a)(3)(B).

4 The Commissioner has established a five-step sequential analysis to
5 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
6 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
7 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
8 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
9 C.F.R. § 416.920(b).

10 If the claimant is not engaged in substantial gainful activity, the analysis
11 proceeds to step two. At this step, the Commissioner considers the severity of the
12 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
13 “any impairment or combination of impairments which significantly limits [his or
14 her] physical or mental ability to do basic work activities,” the analysis proceeds to
15 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
16 this severity threshold, however, the Commissioner must find that the claimant is
17 not disabled. *Id.*

18 At step three, the Commissioner compares the claimant’s impairment to
19 severe impairments recognized by the Commissioner to be so severe as to preclude
20 a person from engaging in substantial gainful activity. 20 C.F.R. §

1 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
2 enumerated impairments, the Commissioner must find the claimant disabled and
3 award benefits. 20 C.F.R. § 416.920(d).

4 If the severity of the claimant's impairment does not meet or exceed the
5 severity of the enumerated impairments, the Commissioner must pause to assess
6 the claimant's "residual functional capacity." Residual functional capacity (RFC),
7 defined generally as the claimant's ability to perform physical and mental work
8 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
9 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

10 At step four, the Commissioner considers whether, in view of the claimant's
11 RFC, the claimant is capable of performing work that he or she has performed in
12 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
13 capable of performing past relevant work, the Commissioner must find that the
14 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
15 performing such work, the analysis proceeds to step five.

16 At step five, the Commissioner considers whether, in view of the claimant's
17 RFC, the claimant is capable of performing other work in the national economy.
18 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
19 must also consider vocational factors such as the claimant's age, education and
20 past work experience. *Id.* If the claimant is capable of adjusting to other work, the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §
2 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis
3 concludes with a finding that the claimant is disabled and is therefore entitled to
4 benefits. *Id.*

5 The claimant bears the burden of proof at steps one through four above.
6 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
7 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
8 capable of performing other work; and (2) such work “exists in significant
9 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
10 700 F.3d 386, 389 (9th Cir. 2012).

11 **ALJ’S FINDINGS**

12 On March 28, 2018, Plaintiff applied for Title XVI supplemental security
13 income benefits alleging a disability onset date of March 1, 2018.³ Tr. 15, 85, 211-

14 _____
15 ³ Plaintiff previously applied for Title XVI benefits and Title II childhood
16 disability benefits on January 10, 2011; the applications were denied initially on
17 May 18, 2011 and not appealed. Tr. 87. Plaintiff applied again for Title XVI
18 benefits on November 17, 2011, which resulted in an ALJ denial on November 6,
19 2013, and the Appeals Council declined to review the decision on December 15,
20 2014. *Id.*, Tr. 59-84.

1 16. The application was denied initially, and on reconsideration. Tr. 121-29, 134-
2 40. Plaintiff appeared before an administrative law judge (ALJ) on December 31,
3 2019. Tr. 32-58. On March 4, 2020, the ALJ denied Plaintiff's claim. Tr. 12-31.

4 At step one of the sequential evaluation process, the ALJ found Plaintiff has
5 not engaged in substantial gainful activity since March 28, 2018. Tr. 17. At step
6 two, the ALJ found that Plaintiff has the following severe impairments: left knee
7 degenerative changes with internal derangement; chronic venous stasis of the right
8 leg; attention-deficit hyperactivity disorder; depressive disorder; anxiety disorder;
9 post-traumatic stress disorder; personality disorder; and history of substance use
10 disorder. *Id.*

11 At step three, the ALJ found Plaintiff does not have an impairment or
12 combination of impairments that meets or medically equals the severity of a listed
13 impairment. Tr. 18. The ALJ then concluded that Plaintiff has the RFC to perform
14 light work with the following limitations:

15 [Plaintiff] can only occasionally climb ramps and stairs and cannot
16 climb ladders, ropes or scaffolds; he can only occasionally kneel,
17 crouch, and crawl; he should avoid concentrated exposure to
18 excessive vibration and workplace hazards such as working with
19 dangerous machinery and working at unprotected heights; he can
20 frequently handle and finger; he can perform simple routine tasks in a
routine work environment with simple work-related decisions
involving only occasional superficial interaction with co-workers with
no requirement for teamwork or supervision of other employees, and
only very limited incidental interaction with the public, meaning the
job does not require interaction with [the] public as part of the job

1 duties, nor are the job duties performed in an area that may involve
2 frequent contact with the public.

3 Tr. 20.

4 At step four, the ALJ found Plaintiff has no past relevant work. Tr. 25. At
5 step five, the ALJ found that, considering Plaintiff's age, education, work
6 experience, RFC, and testimony from the vocational expert, there were jobs that
7 existed in significant numbers in the national economy that Plaintiff could perform,
8 such as housekeeping/cleaner, products assembler, and inspector/hand packager.
9 Tr. 26. Therefore, the ALJ concluded Plaintiff was not under a disability, as
10 defined in the Social Security Act, from the date of the application through the date
11 of the decision. *Id.*

12 On September 11, 2020, the Appeals Council denied review of the ALJ's
13 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for
14 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

15 ISSUES

16 Plaintiff seeks judicial review of the Commissioner's final decision denying
17 him supplemental security income benefits under Title XVI of the Social Security
18 Act. Plaintiff raises the following issues for review

- 19 1. Whether the ALJ properly evaluated the medical opinion evidence; and
- 20 2. Whether the ALJ properly evaluated Plaintiff's symptom claims.

- ECF No. 16 at 2.

DISCUSSION

A. Medical Opinion Evidence

Plaintiff contends the ALJ erred in rejecting the opinions of Ronald Early, Ph.D., M.D.; and Alexander Patterson, Psy.D. ECF No. 16 at 4-14. As an initial matter, for claims filed on or after March 27, 2017, new regulations apply that change the framework for how an ALJ must evaluate medical opinion evidence. *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20 C.F.R. § 416.920c. The new regulations provide that the ALJ will no longer “give any specific evidentiary weight...to any medical opinion(s)...” *Revisions to Rules*, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R. § 416.920c(a). Instead, an ALJ must consider and evaluate the persuasiveness of all medical opinions or prior administrative medical findings from medical sources. 20 C.F.R. § 416.920c(a) and (b). The factors for evaluating the persuasiveness of medical opinions and prior administrative medical findings include supportability, consistency, relationship with the claimant (including length of the treatment, frequency of examinations, purpose of the treatment, extent of the treatment, and the existence of an examination), specialization, and “other factors that tend to support or contradict a medical opinion or prior administrative medical finding” (including, but not limited to, “evidence showing a medical source has familiarity with the

1 other evidence in the claim or an understanding of our disability program’s policies
2 and evidentiary requirements”). 20 C.F.R. § 416.920c(c)(1)-(5).

3 Supportability and consistency are the most important factors, and therefore
4 the ALJ is required to explain how both factors were considered. 20 C.F.R. §
5 416.920c(b)(2). Supportability and consistency are explained in the regulations:

6 (1) *Supportability*. The more relevant the objective medical evidence
7 and supporting explanations presented by a medical source are to
8 support his or her medical opinion(s) or prior administrative
9 medical finding(s), the more persuasive the medical opinions or
10 prior administrative medical finding(s) will be.

11 (2) *Consistency*. The more consistent a medical opinion(s) or prior
12 administrative medical finding(s) is with the evidence from other
13 medical sources and nonmedical sources in the claim, the more
14 persuasive the medical opinion(s) or prior administrative medical
15 finding(s) will be.

16 20 C.F.R. § 416.920c(c)(1)-(2). The ALJ may, but is not required to, explain how
17 the other factors were considered. 20 C.F.R. § 416.920c(b)(2). However, when
18 two or more medical opinions or prior administrative findings “about the same
19 issue are both equally well-supported ... and consistent with the record ... but are
20 not exactly the same,” the ALJ is required to explain how “the other most
persuasive factors in paragraphs (c)(3) through (c)(5)” were considered. 20 C.F.R.
§ 416.920c(b)(3).

21 The parties disagree over whether Ninth Circuit case law continues to be
22 controlling in light of the amended regulations, specifically whether the “clear and

1 convincing” and “specific and legitimate” standards still apply. ECF No. 16 at 4-6;
2 ECF No. 17 at 3-7. “It remains to be seen whether the new regulations will
3 meaningfully change how the Ninth Circuit determines the adequacy of [an] ALJ’s
4 reasoning and whether the Ninth Circuit will continue to require that an ALJ
5 provide ‘clear and convincing’ or ‘specific and legitimate reasons’ in the analysis
6 of medical opinions, or some variation of those standards.” *Gary T. v. Saul*, No.
7 EDCV 19-1066-KS, 2020 WL 3510871, at *3 (C.D. Cal. June 29,
8 2020) (citing *Patricia F. v. Saul*, No. C19-5590-MAT, 2020 WL 1812233, at *3
9 (W.D. Wash. Apr. 9, 2020)). “Nevertheless, the Court is mindful that it must defer
10 to the new regulations, even where they conflict with prior judicial precedent,
11 unless the prior judicial construction ‘follows from the unambiguous terms of the
12 statute and thus leaves no room for agency discretion.’” *Gary T.*, 2020 WL
13 3510871, at *3 (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet*
14 *Services*, 545 U.S. 967, 981-82 (2005); *Schisler v. Sullivan*, 3 F.3d 563, 567-58 (2d
15 Cir. 1993) (“New regulations at variance with prior judicial precedents are upheld
16 unless ‘they exceeded the Secretary’s authority [or] are arbitrary and
17 capricious.’”).

18 There is not a consensus among the district courts as to whether the “clear
19 and convincing” and “specific and legitimate” standards continue to apply. *See*,
20 *e.g.*, *Kathleen G. v. Comm’r of Soc. Sec.*, 2020 WL 6581012, at *3 (W.D. Wash.

Nov. 10, 2020) (applying the specific and legitimate standard under the new regulations); *Timothy Mitchell B., v. Kijakazi*, 2021 WL 3568209, at *5 (C.D. Cal. Aug. 11, 2021) (stating the court defers to the new regulations); *Agans v. Saul*, 2021 WL 1388610, at *7 (E.D. Cal. Apr. 13, 2021) (concluding that the new regulations displace the treating physician rule and the new regulations control); *Madison L. v. Kijakazi*, No. 20-CV-06417-TSH, 2021 WL 3885949, at *4-6 (N.D. Cal. Aug. 31, 2021) (applying only the new regulations and not the specific and legitimate nor clear and convincing standard). For the sake of consistency in this District, the Court adopts the rationale and holding articulated on the issue in *Emilie K. v. Saul*, No. 2:20-cv-00079-SMJ, 2021 WL 864869, *3-4 (E.D. Wash. Mar. 8, 2021), *appeal docketed*, No. 21-35360 (9th Cir. May 10, 2021). In *Emilie K.*, this Court held that the ALJ did not err in applying the new regulations over Ninth Circuit precedent, because the result did not contravene the Administrative Procedure Act's requirement that decisions include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." *Id.* at *4 (citing 5 U.S.C. § 557(c)(A)). This rationale has been adopted in other cases with this Court. *See, e.g., Jeremiah F. v. Kijakazi*, No. 2:20-CV-00367-SAB, 2021 WL 4071863, at *5 (E.D. Wash. Sept. 7, 2021). Nevertheless, it is not clear that the Court's analysis in this matter

1 would differ in any significant respect under the specific and legitimate standard
2 set forth in *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

3 *1. Dr. Early*

4 On June 30, 2016, Dr. Early examined Plaintiff and rendered an opinion on
5 Plaintiff's functioning. Tr. 391-403. Dr. Early diagnosed Plaintiff with post-
6 traumatic stress disorder and unspecified depressive disorder. Tr. 398. Dr. Early
7 opined Plaintiff's mental health impairment was fixed and stable, and he had a
8 permanent partial mental health impairment that he rated at a category four.⁴ Tr.

9 _____
10 ⁴ While the questionnaire does not list the definition of a category four impairment,
11 WAC 296-20-340 provides the definition for categories of permanent mental
12 health impairments; a category four impairment indicates: "Very poor judgment,
13 marked apprehension with startle reactions, foreboding leading to indecision, fear
14 of being alone and/or insomnia; some psychomotor retardation or suicidal
15 preoccupation; fear-motivated behavior causing moderate interference with daily
16 life; frequently recurrent and disruptive organ dysfunction with pathology of organ
17 or tissues; obsessive-compulsive reactions causing inability to work with others or
18 adapt; episodic losses of physical function from hysterical or conversion reactions
19 lasting longer than several weeks; misperceptions including sense of persecution or
20 grandiosity which may cause domineering, irritable or suspicious behavior;

399. Dr. Early also opined Plaintiff is unable to successfully maintain and sustain meaningful and gainful employment. Tr. 399. Dr. Early further opined Plaintiff has moderate limitations in his ability to understand and remember detailed instructions, carry out detailed instructions, respond appropriately to changes in the work setting, and be aware of normal hazards and take appropriate precautions; marked limitations in his ability to maintain attention/concentration for extended periods of time, accept instructions and respond appropriately to criticism from supervisors, travel to unfamiliar places or use public transportation, and set realistic goals or make plans independently of others; and severe limitations in his ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances, work in coordination with or proximity to others without being distracted by them, complete a normal workday/workweek without interruptions from psychologically-based symptoms and perform at a _____ thought disturbance causing memory loss that interferes with work or recreation; periods of confusion or vivid daydreams that cause withdrawal or reverie; deviations in social behavior which cause concern to others; lack of emotional control that is a nuisance to family and associates; moderate disturbance from organic brain disease such as to require a moderate amount of supervision and direction of work day activities.”

1 consistent pace without an unreasonable number/length of rest periods, interact
2 appropriately with the general public, get along with coworkers or peers without
3 behavioral extremes, maintain socially appropriate behavior and adhere to basic
4 standards of neatness and cleanliness, and travel to unfamiliar places or use public
5 transportation; and he otherwise had no to only mild limitations in the remaining
6 areas of functioning. Tr. 400-02.

7 The ALJ did not address Dr. Early's opinion, and only noted that no
8 "opinion that predates the current relevant period has been weighed for
9 persuasiveness." Tr. 21. The ALJ must evaluate medical opinions using the
10 factors listed in 20 C.F.R. § 416.920c. When the ALJ improperly ignores
11 significant and probative evidence in the record favorable to a claimant's position,
12 the ALJ "thereby provide[s] an incomplete residual functional capacity
13 determination." *Hill*, 698 F.3d at 1160-61; *see also Vincent v. Heckler*, 739 F.2d
14 1393, 1394-95 (quoting *Cotter v. Harris*, 642 F.2d 700, 706 (3d Cir. 1981)).
15 Defendant argues the ALJ did not error in failing to address Dr. Early's opinion,
16 and any error would be harmless, because Dr. Early rendered his opinion 20
17 months before the alleged onset date, and thus the opinion is not significant
18 probative evidence. ECF No. 17 at 7-8. Defendant cites to a case in which this
19 Court found two opinions rendered four years prior to the alleged onset date were
20 not probative evidence. ECF No. 17 at 7 (citing *White v. Colvin*, No. 2:24-cv-

003344-MKD, 2016 WL 5109519 at *7 (E.D. Wash. Sept. 19, 2016). In *White*, the Plaintiff worked at a substantial gainful activity level after the two opinions were rendered, and this Court found the opinions were inconsistent with Plaintiff's ability to work. *White*, 2016 WL 5109519 at *7. Defendant also cites to *Carmickle*; in which the Ninth Circuit found an opinion that predated the alleged onset date was not relevant, when the opinion was rendered at a time when the Plaintiff was working two jobs, and the opinion was prior to the injury Plaintiff alleged was the disabling event. *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008).

Here, Dr. Early opined Plaintiff's condition was at maximum medical improvement, and it was fixed and stable, and it was unlikely psychiatric treatment would result in any curative benefit. Tr. 398-99. Unlike the plaintiffs in *White* and *Carmickle*, Plaintiff has not engaged in substantial gainful activity since Dr. Early rendered his opinion, and the ALJ did not set forth any analysis as to whether there had been improvement since Dr. Early rendered his opinion. Tr. 17, 21. Further, Dr. Early's opinion is consistent with Dr. Patterson's opinion and Plaintiff's symptom claims. Thus, in this instance, despite the opinion being rendered 20 months prior to the alleged onset date, Dr. Early's opinion is probative evidence. As the ALJ did not set forth any analysis of the consistency nor supportability of Dr. Early's disabling opinion, the Court cannot find the ALJ's failure to address

1 the opinion is harmless. *See Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050,
2 1055-56 (9th Cir. 2006); *Molina*, 674 F.3d at 1115. On remand, the ALJ is
3 instructed to consider Dr. Early's opinion and incorporate the opinion into the RFC
4 or give reasons supported by substantial evidence to reject the opinion.

5 2. *Dr. Patterson*

6 On June 27, 2018, Dr. Patterson, an evaluating provider, rendered an opinion
7 on Plaintiff's functioning. Tr. 404-09. Dr. Patterson diagnosed Plaintiff with
8 unspecified anxiety disorder (rule-out PTSD); unspecified personality disorder
9 (antisocial and borderline traits, provisional diagnosis); alcohol use disorder, in
10 sustained remission; and attention deficit hyperactivity disorder, unspecified (per
11 history). Tr. 408. Dr. Patterson opined that Plaintiff would have difficulty
12 accepting instructions from supervisors and interacting with coworkers and the
13 public; his ability to establish healthy work relationships is very questionable; he
14 would have difficulty completing a normal workday/workweek without
15 interruptions from a psychiatric condition and dealing with the usual stress
16 encountered in the workplace; and he has a low tolerance for stress and is likely to
17 decompensate under normal workplace pressures, possibly leading to aggression
18 and violence. Tr. 409. The ALJ found Dr. Patterson's opinions not fully
19 persuasive. Tr. 23. As the case is being remanded to consider Dr. Early's opinion,
20

1 and Dr. Patterson's opinion is consistent with Dr. Early's opinion, the ALJ is also
2 instructed to reconsider Dr. Patterson's opinion.

3 **B. Plaintiff's Symptom Claims**

4 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
5 convincing in discrediting his symptom claims. ECF No. 16 at 14-20. An ALJ
6 engages in a two-step analysis to determine whether to discount a claimant's
7 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2.
8 "First, the ALJ must determine whether there is objective medical evidence of an
9 underlying impairment which could reasonably be expected to produce the pain or
10 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).
11 "The claimant is not required to show that [the claimant's] impairment could
12 reasonably be expected to cause the severity of the symptom [the claimant] has
13 alleged; [the claimant] need only show that it could reasonably have caused some
14 degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

15 Second, "[i]f the claimant meets the first test and there is no evidence of
16 malingering, the ALJ can only reject the claimant's testimony about the severity of
17 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the
18 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
19 omitted). General findings are insufficient; rather, the ALJ must identify what
20 symptom claims are being discounted and what evidence undermines these claims.

1 *Id.* (quoting *Lester*, 81 F.3d at 834; *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th
2 Cir. 2002) (requiring the ALJ to sufficiently explain why it discounted claimant’s
3 symptom claims)). “The clear and convincing [evidence] standard is the most
4 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,
5 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,
6 924 (9th Cir. 2002)).

7 Factors to be considered in evaluating the intensity, persistence, and limiting
8 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
9 duration, frequency, and intensity of pain or other symptoms; 3) factors that
10 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
11 side effects of any medication an individual takes or has taken to alleviate pain or
12 other symptoms; 5) treatment, other than medication, an individual receives or has
13 received for relief of pain or other symptoms; 6) any measures other than treatment
14 an individual uses or has used to relieve pain or other symptoms; and 7) any other
15 factors concerning an individual’s functional limitations and restrictions due to
16 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
17 416.929(c). The ALJ is instructed to “consider all of the evidence in an
18 individual’s record,” to “determine how symptoms limit ability to perform work-
19 related activities.” SSR 16-3p, 2016 WL 1119029, at *2.
20

1 The ALJ found that Plaintiff's medically determinable impairments could
2 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
3 statements concerning the intensity, persistence, and limiting effects of his
4 symptoms were not entirely consistent with the evidence. Tr. 21.

5 The ALJ's evaluation of Plaintiff's symptom claims and the resulting
6 limitations largely relies on the ALJ's assessment of the medical evidence and
7 Plaintiff's lack of ongoing mental health treatment. Having determined a remand
8 is necessary to readdress the medical source opinions, which includes opinions that
9 Plaintiff would have difficulty establishing a productive therapeutic relationship
10 and treatment would not result in any curative benefit, Tr. 398, 408-09, any
11 reevaluation must necessarily entail a reassessment of Plaintiff's subjective
12 symptom claims. Thus, the Court need not reach this issue and on remand the ALJ
13 must also carefully reevaluate Plaintiff's symptom claims in the context of the
14 entire record. *See Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th Cir. 2012) ("Because
15 we remand the case to the ALJ for the reasons stated, we decline to reach
16 [plaintiff's] alternative ground for remand.").

C. Remedy

Plaintiff urges this Court to remand for an immediate award of benefits. ECF No. 16 at 20-21.

“The decision whether to remand a case for additional evidence, or simply to award benefits is within the discretion of the court.” *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)). When the Court reverses an ALJ’s decision for error, the Court “ordinarily must remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (“the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation”); *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social Security cases, the Ninth Circuit has “stated or implied that it would be an abuse of discretion for a district court not to remand for an award of benefits” when three conditions are met. *Garrison*, 759 F.3d at 1020 (citations omitted). Under the credit-as-true rule, where (1) the record has been fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on

1 remand, the Court will remand for an award of benefits. *Revels v. Berryhill*, 874
2 F.3d 648, 668 (9th Cir. 2017). Even where the three prongs have been satisfied,
3 the Court will not remand for immediate payment of benefits if “the record as a
4 whole creates serious doubt that a claimant is, in fact, disabled.” *Garrison*, 759
5 F.3d at 1021.

6 Further proceedings are necessary in this case to resolve conflicts in the
7 record, including conflicting medical opinions and gaps in treatment. Given the
8 gaps in treatment, on remand, the ALJ is instructed to consider whether further
9 development of the record is necessary including a consultative examination and/or
10 testimony from a physical or psychological expert, and to order such examinations
11 or obtain such testimony the ALJ deems necessary. As such, this case is remanded
12 for further proceedings consistent with this Order.

13 CONCLUSION

14 Having reviewed the record and the ALJ’s findings, the Court concludes the
15 ALJ’s decision is not supported by substantial evidence and is not free of harmful
16 legal error. Accordingly, **IT IS HEREBY ORDERED:**

17 1. The District Court Executive is directed to substitute Kilolo Kijakazi as
18 Defendant and update the docket sheet.

19 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 16**, is **GRANTED**.

20 3. Defendant’s Motion for Summary Judgment, **ECF No. 17**, is **DENIED**.

1 4. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff
2 REVERSING and REMANDING the matter to the Commissioner of Social
3 Security for further proceedings consistent with this recommendation pursuant to
4 sentence four of 42 U.S.C. § 405(g).

5 The District Court Executive is directed to file this Order, provide copies to
6 counsel, and **CLOSE THE FILE**.

7 DATED December 7, 2021.

8 s/Mary K. Dimke
9 MARY K. DIMKE
10 UNITED STATES MAGISTRATE JUDGE